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Attorneys for Plaintiff  
DFINITY USA RESEARCH, LLC

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DFINITY USA RESEARCH, LLC, a  
limited liability company,

Plaintiff,

vs.

ERIC BRAVICK, an individual and DOES  
1 - 100, inclusive,

Defendants.

Case No. 5:22-cv-03732-EJD

**PLAINTIFF DFINITY USA  
RESEARCH, LLC'S OPPOSITION TO  
DEFENDANT'S REQUEST FOR  
JUDICIAL NOTICE IN SUPPORT OF  
MOTION TO DISMISS**

Date: January 26, 2023  
Time: 9:00 a.m.  
Ct. room: 4, 5th Floor  
Judge: The Hon. Edward J. Davila

Removal of Action Filed: June 24, 2022  
Santa Clara County Superior Court  
Case No. 22CV398321

Complaint Filed: May 11, 2022

1 Plaintiff DFINITY USA RESEARCH, LLC respectfully requests that the Court deny  
 2 defendant Eric Bravick's request to take judicial notice of Exhibits 1 and 2. The documents are  
 3 identified by Mr. Bravick as follows:

- 4 • Exhibit 1: October 4, 2021 email from Christopher Tarpley to Eric Bravick; and
- 5 • Exhibit 2: November 2, 2021 email from Bradford Newman to Eric Bravick.

6 Neither of the documents is subject to judicial notice and Mr. Bravick's request for judicial  
 7 notice is an improper attempt to inject documents into the record that are outside of the  
 8 complaint on a motion to dismiss.

9 "[W]hen the legal sufficiency of a complaint's allegations is tested by a motion under  
 10 Rule 12(b)(6), 'review is limited to the complaint.'" *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th  
 11 Cir. 2001) (quoting *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993)).

12 Documents not physically attached to the complaint may only be considered if they are: (1)  
 13 subject to judicial notice or (2) if the documents' "authenticity . . . is not contested" and "the  
 14 plaintiff's complaint necessarily relies on them." *Id.* (quoting *Parrino v. FHP, Inc.*, 146 F.3d  
 15 699, 705-06 (9th Cir. 1998)) (a district court abused its discretion by taking judicial notice of  
 16 disputed matters of fact).

17 Under the Rules of Evidence, courts may only judicially notice facts that are not subject  
 18 to reasonable dispute because they (1) are generally known within the trial court's territorial  
 19 jurisdiction or (2) can be accurately and readily determined from sources whose accuracy cannot  
 20 reasonably be questioned. Fed. R. Evid. 201. Documents subject to interpretation, like the  
 21 emails and communications Mr. Bravick seek to inject into the record through its request, are not  
 22 judicially noticeable. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1000 (9th Cir. 2018)  
 23 (a court abused its discretion by judicially noticing an investor call transcript; "[i]t is improper to  
 24 judicially notice a transcript when the substance of the transcript 'is subject to varying  
 25 interpretations, and there is a reasonable dispute as to what the [transcript] establishes'").  
 26 Indeed, courts have expressly held that such communications are not subject to judicial notice  
 27 even if there is not a dispute over their authenticity. *In re Apple Inc. Device Performance Litig.*,

386 F.Supp.3d 1155, 1165 (N.D. Cal. 2019) (an email was not a proper subject of judicial notice “because the meaning of the email is subject to reasonable dispute”); *Lincoln Ben. Life Co. v. Fundament*, No. SA CV 18-0260-DOC (JDEx), 2018 U.S. Dist. LEXIS 139486, at \*12 (C.D. Cal. Aug. 7, 2018) (“Emails and letters between counsel and the parties are not documents or information that are ‘generally known’ or that ‘can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned’”). Mr. Bravick’s request for judicial notice of email correspondence, therefore, must be denied.

Mr. Bravick’s argument that the documents he submits are subject to judicial notice because they are alluded to in the complaint is also incorrect as a matter of law and improperly conflates judicial notice with principles of incorporation-by-reference. “Unlike rule-established judicial notice, incorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself.” *Khoja*, 899 F.3d at 1002. Plaintiff in this case did not incorporate any of the documents submitted by Mr. Bravick by reference in the complaint and did not extensively rely on any such documents. In any event, a motion for judicial notice is not a proper mechanism by which to make these disputed documents part of the complaint.

Mr. Bravick’s attempt to add evidence that is outside of Plaintiff’s complaint into the record for purposes of a motion to dismiss is patently improper. Because the disputed communications and emails the he seek to inject into the record are not subject to judicial notice as a matter of law, Plaintiff respectfully request that this Court deny Mr. Bravick’s Request for Judicial Notice in its entirety.

Dated: August 5, 2022

BAKER & McKENZIE LLP  
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By: /s/ Bradford K. Newman  
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